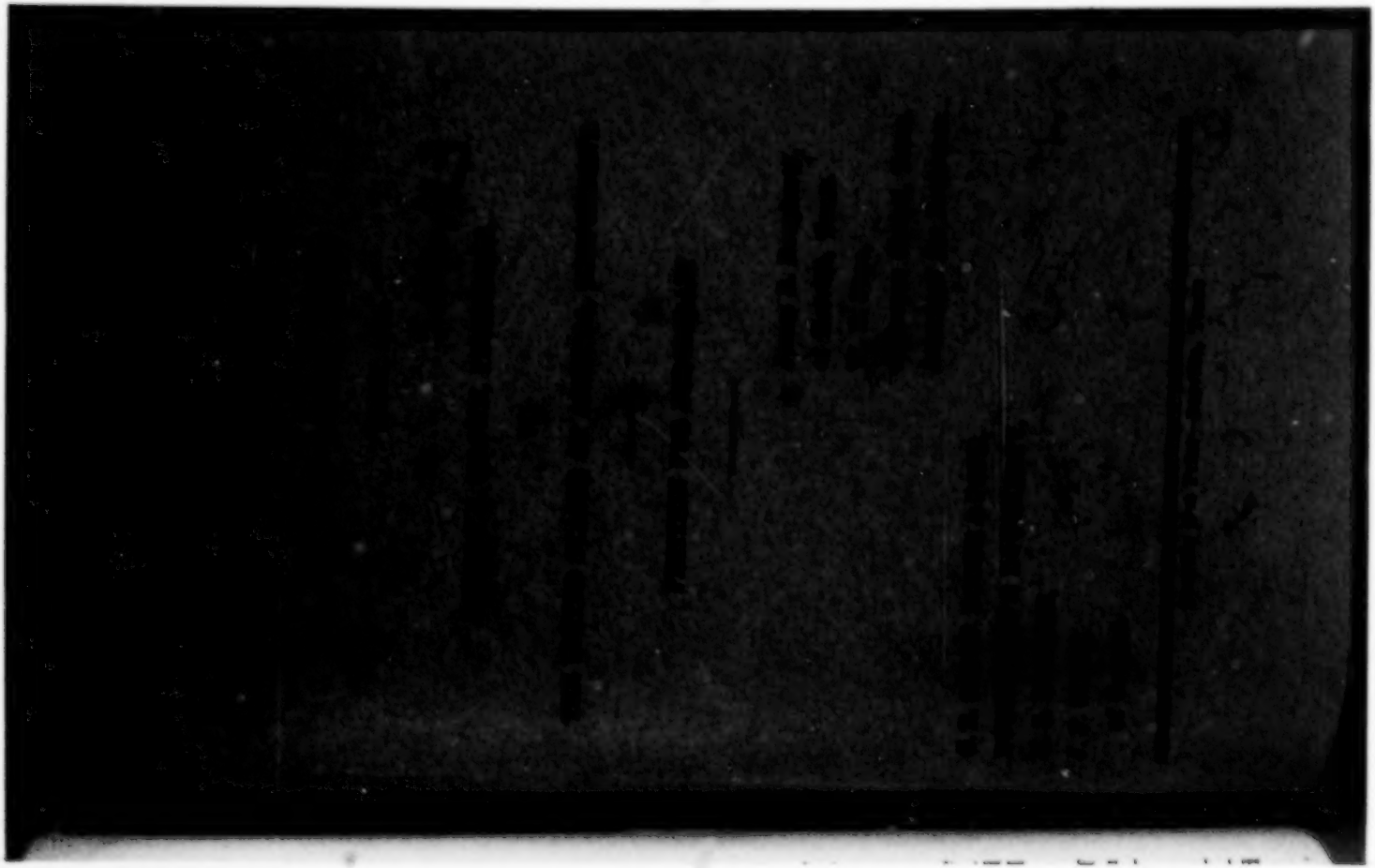

in this cause, and also files herewith necessary printed copies of said record, and a brief and argument in support of this motion, and makes, as required by the rules, the following:

SUMMARY AND SHORT STATEMENT OF THE MATTERS INVOLVED AND THE REASONS RELIED UPON FOR WRIT OF CERTIORARI.

I.

This is a criminal case, wherein petitioner is prosecuted by indictment, charging him with the offense of murder, alleged to have been committed on property conveyed to the United States for its public purposes. He was found guilty of murder in the second degree, and sentenced to fifteen years imprisonment.

II.

The government asserted jurisdiction on the ground that the offense was committed on lands acquired by it in the town of Beeville, Bee County, Texas, for its public purposes. The indictment did not allege the character of the public purposes for which the property was acquired. In other words, it did not charge that the property was acquired for the purpose of the erection of a fort, magazine, arsenal, dock-yard or other needful building, but alleged broadly that the property was acquired for "the public purposes of the United States."

III.

Petitioner, by appropriate pleading, contended that the indictment did not charge an offense within the territorial jurisdiction of the United States, or an offense against the

United States, since it did not charge that the place where the offense was committed was purchased or otherwise acquired by the United States, with the consent of the Legislature of the State for the purpose of the erection of "a needful building."

IV.

Petitioner seasonably filed his motion to quash the indictment, and after conviction his motion in arrest of judgment, raising by both motions the question of the jurisdiction of the United States Court, and the sufficiency of the indictment. The motions were overruled, and exceptions preserved.

The Circuit Court of Appeals held that it could take judicial notice that the United States had acquired the property for the purpose of a needful building.

V.

Petitioner was tried and convicted.

(a): Of a crime which did not appear from the indictment to be within the jurisdiction of the United States, and

(b): Of an act which was not an offense against the laws of the United States.

The Circuit Court of Appeals held the indictment sufficient, and that the trial court did not err in overruling the motions. This ruling is assigned as error.

VI.

The trial court instructed the jury, over petitioner's objection, that petitioner, though in a place where he had a right to be, and though the deceased was making a felonious as-

In The Supreme Court

Of The United States

..... TERM, 1919.

No.....

ROBERT B. BROWN, PETITIONER,

VS.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR CERTIORARI

To the Honorable Supreme Court of the United States:

Robert B. Brown, a citizen of the State of Texas, having his residence in Bee County, Texas, hereinafter styled petitioner, complaining of the United States of America, hereinafter styled respondent, submits this his Application for Writ of Certiorari, to review a decision of the Honorable Circuit Court of Appeals for the Fifth Circuit, entered on the 12th day of February, A. D. 1919, in Cause No. 3232, styled Robert B. Brown, plaintiff in error, vs. The United States of America, Defendant in Error, and files herewith as an Exhibit to his petition, a certified copy of the entire transcript of the record

sault upon him, with intent to kill him, was obliged to retreat, though without any fault upon his part, before he could exercise his right of self-defense, and oppose force with force, and slay his assailant.

To this charge petitioner excepted.

Special charges were requested by defendant petitioner, and refused by the court, instructing the jury that if petitioner was where he had a right to be, and was without fault on his part, and was unlawfully assaulted by deceased, with the intent to kill him, the petitioner, then the latter should stand his ground, and was not required to retreat, but could resist force with force to the extent even of slaying his assailant so feloniously assaulting him.

Exception was preserved by petitioner to the refusal of the court to submit the charge.

VII.

There was an issue of fact, made by the evidence that the homicide was committed by petitioner at a time when, without fault on his part, he was being feloniously assaulted by the deceased with the intent and purpose to kill petitioner.

VIII.

The Circuit Court of Appeals, in holding that the defendant was bound to retreat, though feloniously assaulted and in danger of death therefrom, before he could exercise his right of self-defense, we submit was mistakenly controlled by the case of Allen vs. United States, 164 U. S. pp.492-497. It should have followed the case of Rowe vs. United States, 164

U. S. pp. 546-558, and the rules governing the subject as declared at the early common law.

The rule at the early common law was that the duty to retreat was not imposed in cases of justifiable homicide or justifiable self-defense, but only in cases of excusable homicide, or excusable self-defense was one who was feloniously assaulted compelled to retreat before he could resist force with force and slay his assailant. The early common law must be looked to to supply the missing elements or ingredients of murder or of defenses to murder under the laws of the United States, where no statute is declaratory thereof.

IX.

There was evidence in the case that petitioner, if guilty at all, was guilty of no higher grade of offense than assault with intent to kill. This phase of the case was not submitted to the jury by the trial court, though appropriate charges were requested thereon, and defendant excepted to the failure of the court to submit this issue.

All of these rulings of the trial court were affirmed by the Circuit Court of Appeals, and the error of both courts is complained of here.

X.

Your petitioner avers that the present case is one in which it is proper to issue a writ of certiorari for the reasons:

(a): The Circuit Court of Appeals, by its decision affirming the judgment of the lower court, holds in effect as a matter of law that the United States Courts has jurisdiction

over territory acquired by the United States for any public purposes, regardless of whether or not such purpose is one for which the constitution of the United States authorizes the acquisition of territory and cession of jurisdiction by the states.

(b): Because the Circuit Court of Appeals holds as a matter of law in effect that an indictment need not charge that the homicide was committed on territory ceded for one of the particular purposes for which cession of jurisdiction by the states of their territory is permitted by the Constitution of the United States, though such locality is an element of the offense by the terms of Art. 272 of the Judicial Code, defining murder.

(c): Because the Circuit Court of Appeals erred in holding that in the absence of these jurisdictional averments in the indictment, it could take judicial notice that the property had been acquired by the United States for the purpose of a needful building, and jurisdiction had been ceded for such purposes.

(d): The Circuit Court of Appeals, by its holding that petitioner was obliged to retreat before he could exercise his right of self-defense against the felonious assault of one endeavoring to murder him, erroneously declared the substantive law of the United States, and the early common law of England as imposing the duty of retreat upon one who without fault is assaulted feloniously by another with intent to kill. In so holding they mistakenly followed the case of Allen

vs. United States, 164 U. S. pp. 492-497, which had no application to the facts and should have been controlled by the principle announced in the case of Rowe vs. United States, 164 U. S., pp. 546-558 and the Beard case 158 U. S., p. 550.

(e): The defendant had a right to have every defensive issue submitted to the jury, and the failure to submit to the jury the issue of assault with intent to kill, was a denial of the right of trial by jury.

The questions here involved are of sufficient general and material importance and intent as to make necessary that they should be determined by the court of last resort.

XI.

In the brief and argument of petitioner, filed herewith, the issue and evidence supporting petitioner's claim are pointed out more fully than in this motion, and said brief is referred to in aid hereof.

XII.

Respondent is represented by the Hon. D. E. Simmons, of Houston, Harris County, Texas, United States District Attorney for the Southern District of Texas.

Wherefore, petitioner prays that this petition for certiorari be granted, and that this court proceed as is required by law and the rules of this court in such case, and upon final hearing the judgment of the trial court and the Circuit Court of Appeals be reversed, and the cause dismissed, or remanded with proper instructions.

W. E. Pope

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Attorneys for petitioner.

I, James R. Dougherty, of counsel for petitioners, named in the foregoing petition, solemnly swear that I have read the foregoing petition, and that the facts therein set forth are true to the best of my knowledge, information and belief. My knowledge is derived from the record in this case, and from what has taken place in my presence and hearing in the court in which this action has been heard.

James R. Dougherty

Subscribed and sworn to before me this 5th day of May, A. D. 1919.

S. L. Robinson

Notary Public in and for Bee Co. Tex.

I, W. E. Pope, attorney and counselor at law, hereby certify that I have examined the foregoing petition for writ of certiorari, that the same is not made for the purpose of delay, and that in my opinion said petition is meritorious and well founded in law, and ought to be granted and the writ issued.

W. E. Pope

Of Counsel for Petitioner.

No.....

IN THE SUPREME COURT OF THE UNITED STATES,

..... TERM, 1919.

ROBERT B. BROWN, PETITIONER,

VS.

THE UNITED STATES OF AMERICA, RESPONDENT.

Comes now Robert B. Brown, by W. E. Pope and James R. Dougherty, of counsel, and moves this Honorable Court that they shall, by certiorari or other proper process to the Honorable, the Judges of the Circuit Court of Appeals for the Fifth Circuit, require said Court to certify to this Honorable Court for its review and determination, a certain cause in said Circuit Court of Appeals lately pending, wherein your petitioner was plaintiff in error and the United States of America was defendant in error, No. 3232, and to that end they now tender herewith their argument and brief with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

W. E. Pope

James R. Dougherty Jr.

.....

Attorneys for Petitioner.

G. R. Scott, Boone and Pope,
Dougherty & Dougherty,
H. S. Bonham,
J. F. Odem,
Of Counsel.

In The Supreme Court

Of The United States

..... TERM, 1919.

No.....

ROBERT R. BROWN, PETITIONER,

VS.

THE UNITED STATES OF AMERICA, RESPONDENT.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI.

James R. Dougherty,
of Beeville, Texas.
W. E. Pope,
of Corpus Christi, Texas.
Attorneys for Petitioner.

G. R. SCOTT, BOONE & POPE,
DOUGHERTY & DOUGHERTY,
H. A. BONHAM,
J. F. ODEM,
of Counsel.

Beeville Bee Print—Beeville, Texas

In The Supreme Court

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..... TERM, 1919.

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ROBERT B. BROWN, PETITIONER,

VS.

THE UNITED STATES OF AMERICA, RESPONDENT.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI.

To the Honorable Supreme Court of the United States:

Your petitioner, Robert B. Brown, would respectfully show that he has this day filed his application for writ of certiorari to review the decision of the Honorable Circuit Court of Appeals for the Fifth Circuit entered on the 12th day of February, A. D. 1919, in Cause No. 3232, styled Robert B. Brown, plaintiff in error vs. The United States of America, Defendant in error, and in support of same respectfully submits the following:

BRIEF AND ARGUMENT.

The questions involved and authorities upon which peti-

tioner relies for the granting of said writ of certiorari are:

QUESTIONS INVOLVED:

The United States Circuit Court of Appeals erred in holding that the indictment charged an offense against the laws of the United States, or within the jurisdiction of its courts.

The indictment, which was brought under Sec. 272 of the Judicial Code, did not allege that the homicide occurred on lands acquired by the United States by consent of the Legislature of the State for the erection of a fort, magazine, arsenal, dock-yard or other needful building—but merely alleged that it occurred on lands acquired by the United States "for its public purposes," and over which it had exclusive jurisdiction.

We submit that the indictment did not charge an offense within the territorial jurisdiction of the United States, or any offense against the United States punishable by the laws of the United States.

The indictment is set out in full, Tr. of Rec., pp. 330-334.

Section 272, under which petitioner was prosecuted, is as follows:

"The crimes and offenses defined in this chapter shall be punished as herein prescribed. * * * .

"Third: When committed * * * within or on any place purchased or otherwise acquired by the United States by consent of the Legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dock-yard or other needful building."

The power of Congress to legislate concerning the places mentioned in Sec. 272 is derived from Art. 1, Sec. 8, Clause 17: "The Congress shall have power * * * * to exercise exclusive legislation in all cases whatsoever over all places purchased by the consent of the Legislature of the State in which the same shall be for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

Since the indictment does not declare that the property was acquired, or jurisdiction ceded for the purpose of the erection of any needful building, which would confer jurisdiction under the constitution, the absence of territorial or areal jurisdiction is apparent on the face of the indictment.

Again, since there is no charge that the homicide occurred on a place acquired by the United States for the erection of a fort * * * or other needful building, there is no provision under Sec. 272 for the punishment of the offense, and the indictment does not charge murder under such article, for the Statute, Sec. 272, is specific in declaring that the offenses described in the Chapter are punishable only when committed on places acquired for the erection of a needful building.

This exact question has never been before this court, but we submit generally:

(a): That the territorial jurisdiction of the Federal courts must appear on the face of the indictment, and

(b): That all the essential elements, descriptive of statutory crimes, must be set out in the indictment.

The absence of these allegations can not be cured by in-

tendment or judicial notice. In U. S. vs. Davis, 5 Mason, 536; Fed. Cas. No. 14730, p. 783, where it was said that the court might take judicial notice of a statute ceding jurisdiction of a place for a Marine Hospital in Chelsea, Justice Storey, on circuit, said:

"We cannot judicially know that the place described in the indictment was purchased under the authority of that statute."

"It should not be left in doubt, or to mere inference from the words of the indictment whether the offense charged was within Federal cognizance." Blitz vs. U. S. 38 Law, Ed. p. 727.

"There must be an affirmation and distinct charge in the indictment. It is a familiar rule of criminal pleading and practice that nothing is taken by intendment. The facts must be charged and charged distinctly." Justice Brewer in U. S. vs. Morrissey, 32 Fed. 151.

In Early vs. Commonwealth, 24 S. E. 936 (Ga.) the indictment averred the offense was committed "within the jurisdiction of the court." The Supreme Court of Georgia passing on the sufficiency of the allegations said: "Jurisdiction is said to be a matter of law, the place where the crime was committed a matter of fact. It is necessary to aver and prove the place where the crime was committed. It is not sufficient to aver as is done in this indictment that the offense was committed 'within the jurisdiction of the court,' which is a conclusion of law, but the indictment should have stated

the facts, which gave the court jurisdiction. The demurrer to the indictment should have been sustained."

An allegation in an indictment that the crime "was committed within the jurisdiction of the court" is not an averment of fact, but a mere statement of a conclusion of law. State vs. Carlson, 62 Pac. Rep. 1019; Johnson vs. State, 58 S. E. Rep. 265.

"The crime must be charged with precision and certainty, and any ingredient of which it is composed must be accurately and clearly alleged. To this end facts must be stated, not conclusions of law." Martin vs. U. S. 168 Fed. 205 (C. C. A.)

In U. S. vs. Lewis, 36 Fed. p. 446 defendant was charged under Art. 5346 R. S. with the offense of an assault on the high seas. It was not alleged that the offense occurred on board of an American vessel. Held, "To constitute a crime against the United States of which this court has jurisdiction, the assault must have taken place on board of an American vessel, and that fact must be alleged in the pleading."

"It seems to be necessary under the act to aver in the indictment, and prove upon the trial, that the place where the crime was committed is within the descriptive terms of the statute." Franklin vs. U. S. 1, Colorado, 35.

"In absence of averment that offense occurred in Indian country, the court could not take jurisdiction." Id.

"The places over which exclusive jurisdiction is granted are those which have been purchased by the United States for the purposes specified in the Constitution. • • • • • •

"The Constitution clearly implies the permanent use of the property purchased for the construction or erection of some of the structures designated or some other needful building. The right of exclusive jurisdiction can be acquired only by the United States in the mode pointed out by the constitution * * * * * * where the lands were purchased by the United States by the consent of the State **for one of the specific and enumerated objects.**" U. S. vs. Tierney, 28 Fed. Cas. 16517.

"It is not competent for the Legislature to abdicate its jurisdiction over its territory, except where the lands are purchased by the United States for the specific purpose contemplated by the Constitution. The rule that legislative consent operates as a complete cession is applicable only to objects which are specified in the above provisions. In re Kelly 71 Fed. 545, Clay vs. State, 4 Kansas 47, People ex rel, Jones vs. Strassheim, 81 N. E. Rep. 1130.

In U. S. vs. Hopkins, Fed. Cas. No. 15,387-A, the facts were that the State of Georgia had ceded jurisdiction to the United States only in places purchased by the United States for forts or fortification: (Syllabus by the court). "The Federal Court had no jurisdiction over land purchased and used for purposes of an arsenal."

"The consent of the states to the purchase of lands within **them for the special purpose named** is, however, essential under the Constitution to the transfer to the general government with the title of political jurisdiction." Id.

The United States Circuit Court of Appeals erred in hold-

ing that the trial court did not err in instructing the jury that plaintiff in error, though in a place where he had a right to be, viz—on his employer's premises, and though the deceased was making a felonious assault upon him, with intent to kill him, or do him some serious bodily injury, was obliged to retreat, though without fault on his part, to the ditch or wall before he could exercise his right of self defense, and slay the deceased.

In the decision of the Circuit Court of Appeals, it is declared——

(a): "The defendant was rightfully where he was at the time of the quarrel, **but was not on his own premises.**"

(b): "A tendency of the evidence was to the effect that the deceased, Hermes, approached defendant, an open knife in his hands, with which he attempted to strike defendant. The evidence, without conflict, showed that defendant on the approach of Hermes, retreated twenty or twenty-five feet to where he had left his rain-coat, in which was his pistol, and after obtaining his pistol from it, stood his ground, using his pistol with fatal effect."

See opinion of Circuit Court of Appeals, Tr. of Rec. pp. 321-322. The trial court charged the jury that it was the duty of defendant to retreat before he could resist force with force. Tr. of Rec., pp. 236 to 238.

Paragraph 10 of the main charge was as follows:

"Under the plea of not guilty, the defendant is entitled to show, if he can by the evidence, that the homicide was

committed in the lawful defense of himself, but it is necessary to remember in considering the question of self-defense, that the party assaulted **is always under the obligation to retreat,** so long as retreat is open to him, provided he can do so without subjecting himself to the danger of death or great bodily harm."

By Paragraph 11 to 15 of the main charge, inclusive, the court reiterated to the jury that the obligation rested upon defendant to retreat notwithstanding he was feloniously assaulted before he could exercise his right of self-defense. The defendant excepted to these charges.

Appropriate charges were requested by defendant, instructing the jury that if defendant was feloniously assaulted, while at a place where he had a right to be, without fault upon his part, he had a right to stand his ground and resist force with force to the extent of slaying his assailant. These charges were refused. To this action of the court defendant excepted. Charge No. 9, requested by defendant, and refused. Tr. of Rec. pp. 252-253.

These rulings were affirmed by the Circuit Court of Appeals.

The Circuit Court of Appeals relies upon the decision in Allen vs. United States, 164 U. S., p. 492. We submit that the decision in that case is not applicable to this case.

The Circuit Court of Appeals denied the right of petitioner to stand his ground, though in the right, on the sole ground that he was not on his own premises. We submit that this

rule is not in accord with reason, and is not in accord with the law on the subject.

In determining whether defendant was compelled to retreat to the wall, before he could exercise his right of self-defense and kill his assailant, who was making a felonious assault upon him with a knife, resort must necessarily be had to the decisions of this court as also to the early common law of England, as this duty to retreat is not declared by the Federal law as an element of self-defense, and exists, if at all, as a part of the early common law, to which the Federal courts resort to ascertain the elements of any crime not declared by statute. We may, therefore, look to the early English authors and statutes to ascertain what the common law of England was at the time of the American Revolution on this subject.

The decisions of the states are in hopeless conflict. Some of the states have developed as their own common law "the rule of flight." The majority of the states however follow the rule of the early common law of England of "stand ground when in the right."

We submit that this court will not follow the common law of the states, but of England in determining the elements of the right of self-defense.

DUTY TO RETREAT—IT DID NOT EXIST IN CASES OF JUSTIFIABLE HOMICIDE OR JUSTIFIABLE SELF-DEFENSE AT THE COMMON LAW.

There is direct conflict in the decisions of the states on the subject. The cases are divided into two classes, those which

hold to what is termed the "fight rule," and the others to what is termed "stand ground when in the right rule."

The early common law has always been recognized by the United States courts as a part of the body of the criminal law of our government insofar as resort must be had to it to supply any failure upon the part of the statutes in defining the ingredients of an offense or the elements that must enter into it in order to make an act criminal.

In the case of United States vs. Palmer et al, 3 Wheaton, p. 613, the second question presented to the court was whether the crime of robbery mentioned in the eighth section of the Act of Congress is the crime of robbery, as recognized and defined at the common law. Replying to this question, Chief Justice Marshall said: "The second question proposed in this case is one on which I presume there can be no doubt, for the definition of robbery under this act we must look for the definition of the terms in the common law."

In the case of United States vs. Smith, 5 Wheaton, p. 160, Mr. Justice Storey said:

"When the act of 1790 declares, that any person who shall commit the crime of robbery, or murder, on the high seas, shall be deemed a pirate, the crime is not less clearly ascertained than it would be by using the definition of these terms as they are found in our treaties of the common law. In fact, by such a reference, the definitions are necessarily included, much as if they stood in the text of the act. In respect to murder, where "malice aforethought" is of the essence of the

offense, even if the common law definition were quoted, in express terms, we should still be driven to deny that the definition was perfect, since the meaning of "malice aforethought" would remain to be gathered from the common law. There would then be no end to our difficulties, or our definitions, for each would involve some terms which might still require some new explanation."

Again in Pettibone vs. United States, 148 U. S. 203, Mr. Chief Justice Fuller said:

"The courts of the United States have no jurisdiction over offenses not made punishable by the Constitution, laws or treaties of the United States, but they resort to the common law for the definition of terms by which offenses are designated."

The common law referred to is the law of England as it existed prior to the American Revolution. See 12 Corpus Juris, p. 198, declaring that English decisions rendered prior to the Revolution are usually considered conclusive evidence of what the common law is. In the same paragraph, the writer declares that the early standard works on the subject of the common law are strong evidence of what it was.

We assert that the early common law, as declared by all of the standard authors on criminal law, is identical with what is termed the "stand ground when in the right rule."

THE EARLY COMMON LAW.

(1): A person who was feloniously assaulted, and not himself in fault, could exercise his right of self-defense with-

out the necessity of retreating to the wall whenever he was at a place where he had a right to be.

(2): If the assault was not felonious, or the difficulty arose in an affray or sudden encounter, and in the course thereof, it became necessary for the slayer to kill his assailant, then before he would be justified in doing so, he must retreat to the wall.

In short, it was the difference between justifiable self-defense and excusable self-defense, corrolaries respectively of "justifiable homicide," and "excusable homicide."

It seems to us that the confusion or rather the conflict in decisions as to whether or not, at the early common law, one who was feloniously assaulted by another was compelled to retreat, before he could exercise his right of self-defense, is due to the fact that this distinction between excusable or justifiable homicide has never been, or at least in but few cases, clearly recognized. The clearest distinction between these two grades of homicide is made in third American edition of Russel on Crimes, page 508 et seq.

It is very clear from the text of this work that the duty to retreat was only imposed in the case of excusable homicide, and never in the case of justifiable homicide. It must be noted too, that the author cites in support of the text, Hale, East, Foster et al. In justifiable homicide, this duty of retreat was not imposed upon a party assaulted feloniously by another in an effort to commit a known felony upon him, such as murder, robbery, rape, arson and the like. Excusable homicide was

divided into two sorts, either per infortunium, by misadventure, or se et sua defendendo. We are not concerned with the first sort. The last sort or subdivision has been mistakenly treated as homicide in true self-defense, due, no doubt to a literal translation of the Latin phrase. As a matter of fact excusable homicide se et sua defendendo was not homicide in true or perfect self-defense, at the common law, but was homicide in a chance medley or sudden recounter where an element of blame attached to the slayer and according to Lord Coke, under such circumstances at the common law, the defendant would have suffered death, but under the statute of Gloucester he was pardoned at the forfeit of his goods and chattels.

In all cases of excusable homicide, the slayer was assaulted suddenly, but not feloniously, or the necessity for the homicide arose in an affray or sudden encounter, in which the slayer was not an entirely unwilling participant, therefore not entirely blameless. The common law required that the person under such circumstances who killed another in his own self-defense (se et sua defendendo) should have retreated as far as he could conveniently to avoid the violence of the assault before he turned upon his assailant.

A wise provision, for the assaulted party was not entirely blameless—this principle is yet incorporated in the laws of all the states, in the general rule, that in mutual altercations there must be abandonment by the slayer of the difficulty before his right to kill in self-defense arises.

In the case of justifiable homicide, however, the rule was entirely different.

There are several phases of justifiable homicide, such as homicide by execution, homicide by officers killing in the course of arrests, officers dispersing mobs in cases of riots, etc., and the class of homicides with which we have to deal, which was termed, by Russel, homicide in the prevention of any forcible and atrocious crime. This class is placed by him on the same basis of freedom from blame as the first three. The rule laid down (Russell on Crimes, 3rd American Ed., at page 519) on the right to defend one's person against violence is stated as follows:

"A man may repel force by force in defense of his person, habitation, or property, against one who manifestly intends and endeavors, by violence, or surprise, to commit a known felony upon either. **In these cases he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is justifiable.** But it has been holden, that this rule does not apply to any crime unaccompanied with force, as picking of pockets. It seems, therefore, that the intent to murder, ravish, or commit other felonies attended with force or surprise, should be apparent, and not left in doubt; so that if A makes an attack upon B, it must plainly appear by the circumstances of the case (as the manner of the assault, the weapon, etc.) that the life of B is in imminent danger, other-

wise his killing the assailant will not be justifiable self-defense."

"Excusable homicide is of two sorts; either per infortunium, by misadventure; or se et sua defendendo, upon a principle of self-defense. The term excusable homicide imports some fault in the party by whom it has been committed, but of a nature so trivial that the law excuses such homicide from the guilt of felony, though in strictness it deems it to be deserving of some degree of punishment. It appears to be the better opinion, that the punishment inflicted for this offense was never greater than a forfeiture of the goods and chattels of the delinquent, or a portion of them; and, from as early a time as our records will reach, a pardon and writ of restitution of the goods and chattels have been granted as a matter of right, upon payment of the expenses of suing them out.

"Excusable homicide in self-defense is a sort of homicide committed **se et sua defendendo**, in defense of a man's person or property, upon some sudden affray, considered by the law as in some measure blameable, and barely excusable." Id. 519 et seq.

"When a man is assaulted in the course of a sudden brawl or quarrel, he may, in some cases, protect himself by killing the person who assaults him, and excuse himself on the ground of self-defense. But, in order to entitle himself to this plea, he must make it appear, first, that before a mortal stroke given he had declined any further combat; secondly, that he then killed his adversary through mere necessity, in order to avoid

immediate death. Under such circumstances, the killing will be excusable self-defense, sometimes expressed in the law by the word chance medley (and it has been written by some chaud medley), the former of which in its etymology, signifies a casual affray; the latter an affray in the heat of blood, or passion. Both of them are pretty much of the same import; but the former has, in common speeches, been often erroneously applied to any manner of homicide, whereas it appears by one of the statutes, and the ancient books, that it is properly applied to such killing as happens in self-defense upon a sudden encounter."

"Homicide upon chance medley borders very nearly upon man-slaughter, and, in fact and experience, the boundaries are in some instances scarcely perceivable, though in consideration of law they have been fixed. In both cases it is supposed that passion had kindled on each side, and blows have passed between the parties; but in the case of man-slaughter, it is either presumed that the combat on both sides had continued to the time the mortal stroke was given, or that the party giving such stroke was not at that time in imminent danger of death. And the true criterion between them is stated to be this: When both parties are actually combating at the time the mortal stroke is given, the slayer is guilty of man-slaughter; but if the slayer has not begun to fight, or having begun endeavors to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defense."

"In all cases of homicide excusable by self-defense, it must be taken that the attack was made upon a sudden occasion, and not premeditated, or with malice; and from the doctrine which has been above laid down, it appears that the law requires, that the person who kills another in his own defense should have retreated as far as he conveniently or safely could, to avoid the violence of the assault, before he turned upon his assailant; and that not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood (1 Russell on Crimes, 3rd American Ed., pp. 508-515).

JUSTIFIABLE HOMICIDE.

In Section 3, Subject—Justifiable Homicide, page 516-521, 1 Russell on Crimes, 3rd American Ed.:

"It has been clearly stated that justifiable homicide is of several kinds, as it may be occasioned by the performance of acts of unavoidable necessity, or by acts done by the performance of the law." P. 516.

"A man may repel force by force in defense of his person, habitation, or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is justifiable."

"And the rule clearly extends only to cases of felony, for if one comes to beat another, or to take his goods merely as a

trespasser though the owner may justify the beating of him, so far as to make him desist, yet if he kills him, it is man-slaughter. But if a house be broken open, though in the day-time, with a felonious intent, it will be within the rule."

* * * * * *

"The rule in the case of justifiable self-defense, according to Foster (see Fost. C. L. 273), does not require retreat by a party feloniously assaulted. The author says:

"In the case of justifiable self-defense the injured party may repel force by force in defense of his person, habitation, or property against one who manifestly intendeth and endeavoreth by violence or surprise to commit a known felony upon either. **In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if, in a conflict between them, he happeneth to kill, such killing is justifiable.**"

Lord Coke (3 Institutes, page 55), speaking of a case of a common assault of A upon B in a mutual combat, says: "If in the course of such fighting together A giveth back until he cometh to a hedge, wall, or other strait beyond which he can not pass, and then, in his own defense and for safeguard of his own life, killeth the other; this is voluntary, and yet no felony, and the jury that finds that was se defendendo, ought to find the special matter. And yet such a precious regard the law hath of the life of man, that the case be inevitable, that, at the common law, he should have suffered death, and, though the statute of Gloucester save his life, yet he shall forfeit all

his goods and chattels." The author then makes the same distinction in regard to retreat in justifiable self-defense contended for by petitioner herein, saying:

"Some, without giving back to a wall, etc., or other inevitable case, as if a thief offer to rob or murder B either abroad or in his house, and thereupon assault him, **and B defends himself without giving back**, and in defense killeth the thief, this is no felony." Cokes 3 Institutes, p. 56

"Regularly it is necessary that the person that kills another in his own defense fly as far as he may to avoid the violence of the assault before he turn upon his assailant * * * * * **but this has some exceptions.**

"One in respect of the person killing, second in respect to the person killed. If a thief assaults a true man, either abroad or in his house to rob or kill him, the true man is not bound to give back, but may kill his assailant, and it is not felony." Hales Pleas of the Crown Chap. 40.

It must be noted, as said by Mr. Russell in his work with respect to the statute of Henry 8, Chap. 5, that this illustration of the principle is not exclusive of other instances of justifiable homicide, but rather illustrative of the fact that where a felonious assault is made abroad upon B with the intent of murdering him, not solely for the purpose of theft, but out of any wanton malice aforethought, B's right to stand his ground and kill his assailant was conferred by the law, and such killing was not felony, and the slayer forfeited nothing.

In Foster's Crown cases, C. 3, p. 273 et seq., published in

1762, the rule is thus stated:

"The writers on the common law, who, I think, have not treated the subject of self-defense with due precision, do not, in terms, make the distinction I am aiming at; **yet all agree that there are cases in which the man may, without retreating, oppose force to force, even to the death. This I call justifiable self-defense. They, justifiable homicide.** They likewise agree that there are cases in which the defendant can not avail himself of the plea of self-defense without showing that he retreated as far as he could with safety; and then, merely for the preservation of his own life, killed the assailant. **This I call self-defense, culpable,** but, through the benignity of the law, excusable. In the case of justifiable self-defense, the injured party may repel force with force in defense of his person, habitation or property against one who manifestly intendeth and endeavoreth, with violence or surprise, to commit a known felony upon either. **In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if, in a conflict between them, he happeneth to kill, such killing is justifiable.**"

Mr. East, in his Treaties on the Pleas of the Crown, (published in 1803), at page 271, says, in speaking of homicide from necessity, makes the clear distinction in terms:

"Herein may be considered, 1—What sort of attack it is lawful and justifiable to resist, even by the death of the assailant, and where the party is without blame. 2—Where such killing is only excusable, or even culpable, and the party is not

free from blame, etc."

In relation to the first sort, the author says: "1—A man may repel force with force, in defense of his person, habitation or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. **In these cases he is not obliged to retreat,** but may pursue his adversary until he has secured himself from all danger, and if he kills him in so doing, it is called justifiable self-defense."

In Hawkin's Pleas of the Crown, 7 Ed. Vol. 1, the author in speaking of justifiable homicide, at page 172 says:

"Of justifiable homicide of a private nature, in the just defense of a man's person, house or goods, I shall show, first, in what cases the killing of a wrong-doer may be justified by reason of such defense. Secondly, where the killing of an innocent person may be so justified.

"Sect. 21. And first, the killing of a wrong-doer, in the making of such defense, may be justified in many cases; as where a man kills one who assaults him in the highway to rob or murder him; or the owner of a house, or any of his servants or lodgers, etc., kill one who attempts to burn it, or to commit in it murder, robbery or other felony (a): or a woman kills one who attempts to ravish her (1) or a servant coming suddenly and finding his master robbed and slain, falls upon the murderer immediately and kills him; for he does it in the height of his surprise, and under just apprehension of the like

attempt upon himself; but in other circumstances he could not have justified the killing of such an one, but ought to have apprehended him, &c.

"Sect. 24: And I can see no reason why a person who without provocation is assaulted by another in any place whatsoever, in such a manner as plainly shows an intent to murder him, as by discharging a pistol, or pushing him with a drawn sword, etc., may not justify killing such an assailant, as much as if he had attempted to rob him; for is not he who attempts to murder more injurious than he who barely attempts to rob me? And can it be more justifiable to fight for my goods than for my life? And it is not only highly agreeable to reason that a man in such circumstances may lawfully kill another, **but it seems also to be confirmed by the general tenor of our law books**; which, speaking of homicide se defendendo, suppose it is done in some quarrel or affray. From whence it seems reasonable to conclude, that where the law judges a man guilty of homicide se defendendo there must be some precedent quarrel in which both parties always are, or at least may justly be supposed to have been, in some fault, so that the necessity to which a man is at length reduced to kill another, is in some measure presumed to have been owing to himself; for it cannot be imagined that the law, which is founded on the highest reason, will adjudge a man to forfeit all his goods, and put him to the necessity of purchasing his pardon, without some appearance of a fault. And though it may be said that there is none in chance-medley, and yet that the party's goods

are also forfeited by that, I answer, that chance-medley may be intended to proceed from some negligence, or at least want of sufficient caution in the party who is so unfortunate as to commit it, so that he doth not seem to be altogether faultless. Besides, one of the reasons given in our law-books for which homicide se defendendo forfeits goods, is because thereby a true man is killed; but it seems absurd, that he who apparently attempts to murder another, which is the most henious of all felonies, should be esteemed such, when those who attempt other felonies, which seem to be much less criminal, are allowed to be killed as downright villians, not deserving the protection or regard of the law."

"And by 24 Hen 8, c. 5 it is recited, "forasmuch as it hath been in question and ambiguity, that if any evil-disposed person or persons do attempt feloniously to rob or murder any person or persons in or nigh any common highway, cartway, horse-way, or footway, or in their mansions, messuages, or dwelling places; or that feloniously do attempt to break open any dwelling-house in the night-time; should happen, in the prosecution of such felonious intent, to be slain by him or them whom the said evil-doers should so attempt to rob or murder, or by any person or persons being in their dwelling-house, which the same evil-doers should so attempt burglarily to break by night, if the said person so happening in such cases to slay the offender so attempting to commit murder or burglary should forfeit or lose his goods or chattels for the same, as any other person should do that by chance medley should

happen to kill another in his or their defense." For the declaration of which ambiguity and doubt it is enacted, "That whoever shall be indicted or appealed of or for the death of such evil-disposed person or persons attempting to murder, rob, or burglarily to break mansion-houses as aforesaid, shall not forfeit any lands, tenements goods or chattels, but shall be thereof, and for the same, fully acquitted and discharged."

Bishop, at Section 850, in his New Criminal Law (1892) distinguishes the case where retreat to the wall is required, saying:

"3: Retreating 'to the wall.'—These cases of mere assault, and cases of mutual quarrel, where the attacking party has not the purpose of murder in his heart, are those to which is applied the doctrine of the books that one cannot justify the killing of another, though apparently in self-defense, unless he retreated 'to the wall,' or other interposing obstacle before resorting to this extreme right. But——

"4: Murder Meant—Deadly Weapon. Where an attack is made with murderous intent, there being a sufficient overt act, the person attacked is under no duty to fly; he may stand his ground, and if need be kill his adversary. And it is the same where the attack is with a deadly weapon; for in this case the person attacked may well assume that the other intends murder, whether he does in fact or not.

Under paragraph Three the author cites Hale's P. C. 479, 481; 4 Bl. Com. 185; under paragraph four, 3 Coke's Institute, 55-56; Foster, 273; 1 East P. C., 271.

At Section 951, Mr. Bishop declares that not only does one have the right to resist a murderous assault, but it is his duty to do so, and if he flies he commits substantially the offense of misprision of felony.

"2. Law of Misprision—When one witnesses at attempt to commit a felony, the duty comes to him immediately to resist it; insomuch that as we have seen, if he merely declines this duty, he is guilty of an indictable misdemeanor, called misprision of felony. Therefore if a man murderously attacked by another flies instead of resisting, **he commits substantially this offense of misprision of felony; even though we should admit that in strict law he will be excused because acting from the commendable motive of saving life.** While, on the other hand, if he flies from one intending merely a battery, he is in no way amenable either to the letter or spirit of a broken law."

Out of this duty to resist a felony arose the doctrine that one had the right to stand his ground against a murderous assault according to many authorities.

From the foregoing it would seem that the early law writers on the subject are all in accord. We will now consider the decisions of this court.

In the case of Beard vs. United States, 158 U. S. 550, the Supreme Court in effect declared that the rule contended for herein was correct, and that the defendant did not have to retreat, when assaulted feloniously. This is apparent from the reasoning of the court throughout the decision.

In that case this court reviewed both the theory of retreat and of standing ground, and discussed at length and approved the Erwin case, 29th Ohio State, 186, in which the Supreme Court of Ohio reversed the judgment of the trial court, because it charged that it was the duty of the defendant to re treat. In the course of his opinion Justice Harlan said:

"Upon a full review of the authorities and looking to the principles of the common law, as expounded by writers and courts of high authority, the Supreme Court of Ohio held (Erwin vs. State, 29 Ohio State, 186) that the charge was erroneous, saying: 'It is true that all authorities agree that the taking of life in defense of one's person cannot be either justified, or excused, except on the ground of necessity; and that such necessity must be imminent at the time; and they also agree that no man can avail himself of such necessity if he brings it upon himself. The question then is simply this: **Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself on the ground that he failed to fly from his assailant when he might safely have done so?** The law, out of tenderness for human life and the frailities of human nature, will not permit the taking of it to repel a mere trespass, or even to save life where the assault is provoked; **but a true man who is without fault is not obliged to fly from an assailant, who by violence or surprise maliciously seeks to take his life or do him enormous bodily harm.** Now, under the charge below, notwithstanding the defendant may have been without fault, and

so assaulted, with the necessity of taking life to save his own upon him; still the jury could not have acquitted if they found he failed to do all in his power otherwise to save his own life, or prevent the intended harm, as retreating as far as he could, etc. **In this case we think the law was not correctly stated.**" 158 U. S., p. 557, 560.

Justice Harlen in the same case quoted approvingly the following passage from Runyan vs. State, 57 Ind. 80, 83, 26 Am. Rep. 52.

"A very brief examination of the American authorities make it evident that the ancient doctrine, as to the duty of a person assailed to retreat as far as he can, before he is justified in repelling force by force, has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life, and that tendency is well illustrated by the recent decisions of our courts, bearing on the general subject of the right of self-defense. The weight of modern authority, in our judgment, establishes the doctrine that, when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable. . . . . It seems to us that the real question in the case, when it was given to the jury, was whether the

defendant, under all the circumstances, was justified in the use of a deadly weapon in repelling the assault of the deceased. We mean by this, did the defendant have reason to believe, and did he in fact believe, that what he did was necessary for the safety of his own life or to protect him from great bodily harm? On that question the law is simple and easy of solution, as has been already seen from the authorities cited above.

The earliest expression we have on the question of retreat is in charge given by Associate Justice Bushrod Washington, while on circuit in a capital case in 1790. United States vs. Wiltberger, Case No. 16,938, 28 Federal Cases, p. 728, 3 Wash. C. C. 505.

Mr. Justice Washington's charge on the issue of self-defense was:

"**As to this, the law is, that a man may oppose force to force, in defense of his person, his family, or property, against one who manifestly endeavors, by surprise, or violence, to commit a felony, as murder, robbery, or the like. In this definition of justifiable homicide, the following particulars are to be attended to,**" etc.

A comparison of this charge with the language at page 273 of Foster's Crown Cases, shows that Mr. Justice Washington took his charge from Foster's statement of the law, which is as follows:

"In the case of justifiable self-defense the injured party may repel force by force in defense of his person, habitation,

or property against one who manifestly intendeth and endeaverth by violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if, in a conflict between them, he happeneth to kill, such killing is justifiable."

It is substantially the same as the declaration by Mr. East on the law of the subject in his Pleas of the Crown at page 271, stating the rule to be as follows:

"A man may repel force by force, in defense of his person, habitation or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kills him in so doing, it is called justifiable self-defense."

Mr. Justice Field, in the case of United States vs. Outerbridge, 5 SAWY, 620, 27 Federal Cases, No. 15,978, again states the same rule, (note that it is identical with the language used by East, supra), and quotes the Wiltberger case in support, thereof, saying:

"Now upon this subject of justification the law is explicit. A man may repel force by force in the defense of his person, his family or property, against any one who manifestly endeavors by violence or surprise to commit a felony, as murder, robbery, or the like. The right to oppose force to force in such

case is founded upon the law of nature, and is not and can not be superseded by the law of society."

In this case petitioner was denied the right to repel force with force, but was required to retreat before an unlawful attack.

Mr. Wharton says: "A man may repel force by force in defense of his person, habitation, or property, against one or many who manifestly intend and endeavor, by violence or surprise, to commit a known felony on either. In such a case he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and, if in a conflict between them, he happens to kill, such killing is justifiable. The right of self-defense in cases of this kind is founded on the law of nature; and is not, nor can it be, superceded by any law of society. * * * * The right extends to the protection of the person from great bodily harm." Sec. 1019 (2 Wharton's Crim. Law).

Section 485, Wharton on Homicide, cited in the Allen case by Mr. Justice Brown, 164 U. S. pp. 492-497, and cited by the Circuit Court of Appeals herein has no application since it is an express statement of the rule "**in a case of personal conflict, where the defendant seeks to defend on the ground of excusable, (not justifiable) homicide.**" To ascertain Wharton's views on the subject in the latter case, resort should be had to section 1019 quoted from his work in the Runyan case, and approved by this Court in the Beard case. Under the facts in the Allen case, as shown by the dissenting opinion by Judge

Brewer in the first report of the case (150 U. S.) the only issue made by the defendant was whether his offense was manslaughter rather than murder. There was no issue of justifiable homicide, hence the quotation of Justice Brown from Wharton must be confined in its application to the particular case of personal conflict and excusable homicide, in which, as shown in Russell on Crimes, quoted in the brief at length, there was always the duty to retreat.

In the Rowe case, 164 U. S., p. 546, the facts were that——

The defendant was in the office at a hotel in the Cherokee nation. An altercation arose between him and the deceased, in which the defendant struck the deceased. Thereafter the defendant's conduct indicated his purpose to withdraw from the conflict. The deceased afterward assaulted the defendant with a knife, under such circumstances as to lead him to the belief that he was in danger of death or serious bodily injury. Without retreating the defendant shot and killed the deceased. The trial court charged that it was the duty of the deceased to retreat. The Supreme Court held this error, saying:

"If the accused did, in fact, withdraw from the combat, and intended so to do, and if his conduct should have been reasonably so interpreted by the deceased, then the assault of the latter with a deadly weapon, with the intent to take the life of the accused, or to do him great bodily harm, entitled the latter **to the benefit of the principle** announced in Beard vs. United States, 158 U. S. 550, 564 (39; 1086, 1092) in which case it was said: "The defendant was where he had

the right to be when the deceased advanced upon him in a threatening manner and with a deadly weapon; and if the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or to do him great bodily harm, **he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such a way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury.**"

"The accused was where he had the right to be, and the law did not require him to step aside when his assailant was rapidly advancing upon him with a deadly weapon. The danger in which the accused was, or believed himself to be, at the moment he fired, is to some extent indicated by the fact, proved by the Government, that immediately after he disabled his assailant (who had two knives upon his person), he said that he, the accused, was himself mortally wounded and wished a physician to be called. The accused was entitled, so far as his right to resist the attack was concerned, to remain where he was, and to do whatever was necessary or what he had reasonable grounds to believe at the time was necessary, to save his life or to protect himself from great bodily harm. And under the circumstances, it was error, to make the case depend in whole or in part upon the inquiry

whether the accused could, by stepping aside, have avoided the attack, or could have so carefully aimed his pistol as to paralyze the arm of his assailant without more seriously wounding him."

It will be noted herein, that Justice Brown, who wrote the opinion in the Allen case, dissented in the Rowe case, where the Supreme Court made the right of the defendant to stand his ground depend entirely upon the principle that he had a right to resist a felonious attack without retreating. It is likely that Judge Brown was an adherent of the view that the early common law required retreat in justifiable homicide. The majority disagreed with him. In other words, it is reasonable to interpret that the majority of the court in the opinion written by Judge Harlan, who wrote the opinion in the Beard case, refused to hold that there was the same obligation to retreat in justifiable self-defense that there was in excusable self defense, hence Judge Brown's dissent.

We will call attention to some State cases upholding these views and based on a determination of what the early common law was.

In the case of Carpenter vs. State, 36 S. W., p. 905, what was declared to be the common law was enacted as the statutory law on homicide in Arkansas.

Section 1670 thereof defines justifiable homicide as follows:

"Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person or

property, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony."

Section 1672 declares that an attempt to commit murder, rape, robbery, burglary, or any other aggravated felony, although not herein specifically named, upon either the person or property of any person shall be justification of homicide.

Section 1676 refers to excusable homicide **se et sua defendendo.**

"In ordinary cases of one person killing another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily injury, the killing of the other was necessary, and it must appear also that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further contest before the mortal blow or injury was given."

This was made clear by the court in its discussion of these sections, saying:

"These statutes, as far as they extend, are a re-enactment of the common law. They make homicide in self-defense excusable, and justify those committed by the slayer in defense of 'person, habitation or property, against one who manifestly intends and endeavors by violence or surprise, to commit a known felony, such as murder, robbery, arson, burglary, and the like, upon either,' as at common law. As construed by this court, they uphold, protect and enforce the right to slay an assailant in self-defense, to the same extent as it existed at

the time of their enactment. To construe them properly, it is necessary to ascertain what the common law upon the same subject was at the time they took effect.

"At common law, and under the statutes of this State, no one, in resisting an assault made upon him in the course of a sudden brawl or quarrel, or upon a sudden encounter, or in a combat on a sudden quarrel, or from anger suddenly aroused at the time it is made, or in a mutual combat, is justified or excused in taking the life of the assailant, unless he is endangered by such assault as to make it necessary to kill the assailant to save his own life, or to prevent a great bodily injury, and he employed all the means in his power, consistent with his safety, to avoid the danger and avert the necessity of killing. He cannot provoke an attack, bring on the combat, and then slay his assailant, and claim exemption from the consequences of killing his adversary, on the ground of self-defense. He cannot invite or voluntarily bring upon himself an attack, with the view of resisting it, and, when he has done so, slay his assailant, and then shield himself on the assumption that he was defending himself. He cannot take advantage of a necessity produced by his own unlawful or wrongful act. After having provoked or invited the attack, or brought on the combat, he cannot be excused or justified in killing his assailant for the purpose of saving his own life, or preventing a great bodily injury, until he has, in good faith, withdrawn from the combat, as far as he can, and done all in his power to avoid the danger and avert the necessity

of killing. If he has done so, and the other pursues him, and the taking of life becomes necessary to save life or prevent a great bodily injury, he is excusable. Palmore vs. State, 29 Ark. 248; McPherson vs. State, 29 Ark. 225; Levells vs. State, 32 Ark. 585; Stanton vs. State, 13 Ark. 317; Dolan vs. State, 40 Ark. 454; Fitzpatrick vs. State, 37 Ark. 238; Duncan vs. State, 49 Ark. 543, 6 S. W. 164; Johnson vs. State, 58 Ark. 57, 23 S. W. 7; Smith vs. State, 59 Ark. 132, 26 S. W. 712.

"But the rule is different **where a man is assaulted with a murderous intent.** He is then under no obligation to retreat, but may stand his ground, and, if need be, kill his adversary." Continuing, the court said:

"In East's Pleas of the Crown, the author says: "A man may repel force by force, in defense of his person, habitation, or property against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglarly, and the like, upon either. In these cases he is not obliged to retreat but may pursue his adversary until he has secured himself from all danger, and if he killed him in so doing it is called **justifiable self-defense**, as on the other hand, the killing by such felon of any person so lawfully defending himself will be murder. 1 East, P. C. p. 271, See, to the same effect, 4 Bl. Com., p. 180; Foster's Crown Law, 273; and 1 Bish. New Cr. Law. Sec. 850."

"**According to the common law, it is the duty of every one, seeing any felony attempted, by force to prevent it, if**

need be, by the extinguishment of the felon's existence. This is a public duty, and the discharge of it is regarded as promotive of justice. Any one who fails to discharge it is guilty of in indictable misdemeanor, called 'misprision of felony.' And, as a result of this doctrine, Mr. Bishop says, 'If a man murderously attacked by another flies instead of resisting, he commits, substantially, this offense of misprision of felony even though we should admit that in strict law he will be excused, because acting from the commendable motive of saving life.'' 1 Bish. New Cr. Law, Sec. 851, 849; Pond vs. People, 8 Mich. 150, See also, Bostic vs. State, 94 Ala. 45, 10 South, 602; Weaver vs. State, 53 Am. Rep. 389; Gray vs. Combs, 7 J. J. Marsh, 478; 4 Bl. Comm. 180; 1 Hale, P. C. 480; Clark, Cr. Law, 137; 1 Whart. Cr. Law (10th Ed.) Sec. 495.''

Cain's Case, 20 W. Va. 679, contains a clear and concise statement of the common law distinction upon the subject. Therein the court said:

''Where there is a quarrel between two persons, and both are in fault, and a combat as the result of such quarrel takes place, and death ensues, in order to reduce the offense to killing in self-defense two things must appear from the evidence and the circumstances of the case—First, that before the mortal blow was given the prisoner declined further combat, and retreated as far as he could with safety; and secondly, that he necessarily killed the deceased in order to preserve his own life, or to protect himself from great bodily harm. When one, without fault himself, is attacked by another in such a manner,

or under such circumstances, as to furnish a reasonable grounds for apprehending a design to take away his life, or to do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such decision will be accomplished, and the person assaulted has reasonable ground to believe, and does believe, such danger is imminent, he may act upon such appearances, and without retreating kill his assailant, if he has reasonable grounds to believe, and does believe, that such killing is necessary to avoid the apparent danger."

In State vs. Clark, 41 S. E. 207, a careful consideration of the subject, was made by the Supreme Court of Appeals of West Virginia and it declared:

"Where an attack is made with murderous intent, there being a sufficient overt act, the person attacked is under no duty to fly. He may stand his ground and, if need be, kill his adversary." Bish. Cr. Law, Sec. 850. 'It is familiar doctrine that one assaulted with murderous intent may avert the felonious result by taking the aggressor's life. The law of self-defense justifies him, but justification rests equally in the fact that he is resisting the commission of a felony." Bish. Cr. Law, Secs. 849, 866. See also, Whart. Hom. Sec. 533; Manns' Case, 48 W. Va. 480, 37 S. E. 613. So far as point 1 of the syllabus is in conflict with these principles, it is overruled. 'In a case of simple assault, not made with the intent to kill or do other great bodily harm, where the person assailed is not deceived as to its character, so as to be within the rules regarding mistake of fact; in other words, where the

intent of the assailant is not to commit a felony, but a misdemeanor, this right of perfect defense does not exist. The assailed person is not permitted to stand and kill his adversary if there is a way of escape open to him, while yet he may repel force by force, and, within limits differing with the facts of cases, give back blow for blow. The rule, to which the exceptions are not numerous, appears pretty distinctly to be that the law does not justify one in killing another simply to prevent his committing a misdemeanor. **These cases of mere assault, and cases of mutual quarrel, (the Allen case for instance) where the attacking party** has not the purpose of murder in his heart, are those to which is applied the doctrine of the books, that one cannot justify the killing of another, though apparently in self-defense, unless he retreated "to the wall," or other interposing obstacle, before resorting to this extreme right.' Bish. Cr. Law, Sec. 850. The only exception to this is where a man is assaulted, without intent to kill, in his own dwelling house. There he need not run or retreat, but he cannot kill his adversary unless it is necessary to save his own life or prevent another felony. Bish. Cr. Law, Sec. 858; Beard vs. U. S. 158 U. S. 550, 15 Sup. Ct. 962, 39 L. Ed. 1086."

There are many other cases where the principle has been traced which uphold the views here expressed. See Erwin vs. State, 29 Ohio State, Pond vs. People of Mich.

In the State of North Carolina, where the retreat rule is adhered to, there has been strong dissent and forcible declara-

tion of what the common law was upon the subject.

In State vs. Gentry, 34 S. E., p. 706, Montgomery, J., dissenting, the court said:

"In Fost. Crown Law, p. 273, it is written: 'The writers on the Crown law, who, I think, have not treated the subject of self-defense with due precision, do not, in terms, make the distinction I am aiming at, **yet all agree** that there are cases in which a man may, without retreating, oppose force by force, even to the death. This I call justifiable self-defense, they justifiable homicide. In the case of justifiable self-defense, the injured party may repel force with force, in defense of his person, habitation, or property, against one who manifestly intendeth and endeavoreth, with violence or surprise, to commit a known felony on either. **In these cases he is not obliged to retreat**, but may pursue his adversary till he findeth himself out of danger, and, if in a conflict between them he happeneth to kill, such killing is justifiable. The right of self-defense in these cases is founded on the law of nature, and is not, nor can be, suspended by any law of society."

"A distinction which seems reasonable, and is supported by authority, is taken between assaults with felonious intent and assaults without felonious intent. In the latter case, the person assaulted may not stand his ground and kill his adversary, if there is any way of escape open to him, though he is allowed to repel force by force; in the former, where the attack is made with murderous intent, the person attacked is under no obligation to flee. He may stand his ground, and

kill his adversary, if need be.' Id. Sec. 633, and cases there cited. And so Mr. East states the law to be—'A man may repel force by force in defense of his person, habitation, or property against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, such as murder, rape, burglary, robbery, and the like upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and, if he kills him in so doing, it is called justifiable self-defense.' 1 East, P. C. 271; 2 Bish. Cr. Law, Sec. 633. The American doctrine is to the same effect: 'If the person assaulted, being himself faultless, reasonably apprehends death or great bodily harm to himself unless he kill the assailant, the killing is justifiable.' Id. Sec. 644. 'The attempt to commit a felony upon the person may be resisted to the death without flying or avoiding combat.' Id. Sec. 652."

Another View.

In this case Brown was a contractor, employee or servant of the Government, in the performance of his business, and engaged in carrying out a contract with his employer, owner of the tract of land upon which the assault occurred. He was at what may be termed his place of business, or at his master's place of business. He had been for days at the place engaged in superintending the loading and removal of the dirt by his teamsters.

It has never been held that a man must retreat from his place of business when feloniously assaulted, on the contrary

he may stand his ground. It is also uniformly held that a servant or employer has the same right as the owner. If Brown had owned the lot he would not have been obliged to retreat. He was at the place of his business or his master's business. We submit that this gave him the right to stand his ground.

Even in the States which adhere to the view of the necessity to retreat, it is uniformly held that one who is attacked by another in his place of business, in such manner as would cause a person to believe that he is in immediate danger of death or serious bodily harm, is not obligated to retreat, but would be justified in taking the life of his assailant. See Andrews vs. State, 150 Ala., 14; 48 Southern 858; Carey vs. State 76 Ala. 78; State vs. Goodager, 56 Ore., 198; 106 Pac. 38; Rehearing denied, 108 Pac. 185.

In the case of Raines vs. State, 17 Georgia, 46, a person entitled to joint use of a well, went there to draw water for his family. While there he was attacked. It was held by the Supreme Court of Georgia, that he was not required to retreat, but might kill his assailant, if necessary to protect himself from death or serious bodily injury.

This right to stand ground applies also to a servant or employee of the owner of the premises in the states where the strict rule of duty to retreat is enforced. See Snell vs. Dericott, Ala., 49 Southern, p. 895.

Defense of the Castle.

The right to defend one's home, even to the point of slay-

ing one who forcibly intruded therein, or who assaulted the owner therein, does not seem to have depended at the common law entirely on the fact that the slayer was assaulted feloniously, that is with an intent to kill him. See Section 858 Bishop's New Cr. Law. There it is stated:

"Sec. 858: Defense of the Castle—In the early times, our forefathers were compelled to protect themselves in their habitations by converting them into holds of defense; and so the dwelling house was called a castle. To this condition of things the law has conformed, resulting in the familiar doctrine that while a man keeps the doors of his house closed, no other may break and enter it, except in particular circumstances to make an arrest or the like—cases not within the line of our present expositions. From this doctrine is derived another; namely, that the persons within the house may exercise all needful force to keep aggressors out, even to the taking of life. As observed by Campbell, *Jr.*, in Michigan, a man is not obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, or to prevent his forcible entry, even to the taking of life.' And in Missouri a man's business office was held to be his dwelling within this rule."

In support of this text, the author quotes 1 Hale's P. C. 458, declaring:

"A bailiff, having a warrant to arrest Cook upon a capias ad satisfaciendum, came to Cook's house and gave him notice; Cook menaceth to shoot him if he depart not, yet the

bailiff departs not, but breaks open the window to make the arrest; Cook shoots him, and kills him; it was ruled: (1): That it is not murder because he cannot break the house, otherwise it had been if it had been upon an habere facias possessionem. (2): But it was manslaughter, because he knew him to be a bailiff. But, (3): Had he not known him to be a bailiff, or one that came upon that business, it had been no felony, because done in defense of his house. S. C. Cook's Case, Cro. Car. 537."

It would seem from the number of cases cited under this text that this doctrine was thoroughly, and well-established.

See also State vs. Clark, 4 S. E. R. 207, and Suell 20 Demeott, supra.

In the leading case of Aldrich vs. Wright, 16 American Reports at page 341 (53 N. H. 398), the Supreme Court of New Hampshire describes the common law theory of self-defense as being the same as that of the natural law recognized by the Bill of Rights, saying:

"Higher and earlier in its origin than the constitution of the common law, not superceded by those temporal and finite systems, but sustained and enforced by the declaration and sanction of the highest, primary, eternal and infinite law of nature (3 Bl. Com. 4; 1 Hale's P. C. (Am. ed. of 1847) 479, note 1, the right of defense cannot be prescribed within the limits of a narrow technical rule. It is an original and comprehensive prerogative, necessarily ascertained and defined by natural reason. It is not established by any fallible authority,

nor measured by any precedent, nor restricted by any arbitrary dogma. Long upheld by the common law, it has, under the administration of that law, theoretically been what it was before; and now, reinforced by a constitutional guaranty, it is what it has always been. The authorities of the common law show what it has been held to be by men whose opinions are entitled to great consideration. If any discrepancy should be found in the definitions of it, given by common law precedent and by natural reason, the latter must prevail, because the right is explicity asserted in the bill of rights as a natural right, and not as one defined by common law authorities. But between the natural right and its common law definition rightly understood there is no variance that concerns the present inquiry."

* * * * * *

At page 360 the New Hampshire court declares that this common law doctrine of self-defense is:

"The authorities are, that a man may oppose a deadly resistance to a felonious attack, but not to a mere trespass (a trespass against a man's castle being sometimes excepted 3 Greenl. Ev. Sec. 117; East's P. C., ch. 5, Sec. 56; Com. vs. Drew, 4 Mass. 391; 396; Rose Cr. E. 770; 1 Bishop's Cr. L. Sec. 858, 5 ed. A man, in defense of his possession of land or goods, "may justify an assault and battery; but he cannot justify either mayheming or wounding, or mannas of life and members, and so note a diversity between the defense of his person and the defense of his possession or goods. 2 Inst.

316. Where the trespass is barely against property, 'the law does not admit the force of the provocation sufficient to warrant the owner in making use of any deadly or dangerous weapon.' 1 East's P. C., ch. 5, Sec. 56. But a man, upon whom or whose property another manifestly intends to commit a known felony by violence or surprise, **is not obliged to retreat**; on the contrary he may pursue his adversary, and kill him if necessary to prevent the felony. 1 East's P. C., ch. 5, Secs. 44, 45; 3 Greenl. Ev., Sec. 115; 4 Bl. Com. 180; Fost. Cr. L. 274.

"Where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting;' but 'the law of England' will not 'suffer with impunity any crime to be prevented by death, unless the same, if committed, would also be punished by death.' 4 Bl. Com. 181, 182; 1 Bishop's Cr. L. Sec. 849, 5th Ed. The rule generally laid down is, that a deadly resistance is lawful only against an apparent, forcible felony."

Note—At the common law an assault to commit a known felony was punishable by death. Id.

The books are full of the authorities sustaining the contention here urged. We have endeavored, however, to confine our citations to a few of the leading cases lest our argument be too long.

In view of the foregoing array of authorities, as to what the early common law is; in view of the express declaration of approval in the Beard case by the Supreme Court of the

principle upon which they rest; in view of the subsequent recognition, and strong reiteration of the common law doctrine, as a principle, in the Rowe case by the same court; in view of the absence of any Federal statute defining a failure to retreat as an element of the offense of murder, in view of the necessity therefore of resort to the common law to ascertain whether or not this duty existed, we submit, with all due respect and deference, that this court should hold that the Trial Court erred in charging and the Circuit Court of Appeals in affirming that the duty was imposed upon the defendant to retreat before he could resist an assault which, viewed from his standpoint, was calculated to inflict upon him death or some serious bodily injury.

THE RULE OF "RIGHT TO STAND GROUND" IS THE RULE OF REASON.

It seems to us that the rule contended for by petitioner is in accord with reason. The principal thought that must control the mind of any one who is assaulted by another with apparent murderous intent is the necessity of saving his own life, and not whether he is on one side or the other of a boundary line whose exact location may not be known to him. It would make very little difference to the assaulted party, whether he was killed on his own or another's land. Intent is always the controlling element in determining the culpability of a defendant for the commission of a given act. If this be true, can it be truly said that a man's intent in resisting an unlawful deadly assault with the necessary force is

criminal or not, depending upon whether he was upon one side or the other of an imaginary boundary line enclosing his premises? It seems to us that an arbitrary rule, making the motive which controlled one in killing his assailant, viz—the necessity of saving his own life, lawful on one side of a boundary line, and the same motive inducing the same act, prompted by the same laws of nature, without consciousness at the moment of location or boundaries, wrong, unlawful, and felonious, when committed upon the other side of the line, is not in accord with reason or justice.

If two men, who are tenants in common in a tract of land, are standing beyond the boundary thereof, one six feet, and the other four feet beyond the same boundary, be both attacked at the same time from the same direction by two different assailants unlawfully, and both put in fear of their lives, and both should retreat five feet from the point at which they were assaulted, and then stand their ground, and each kill his assailant, and in each instance there was opportunity for further retreat, could it be said that there was any difference in the justification, because one was one foot within, and the other one foot without the line? Or say for instance that A and B own adjoining tracts, and that near the common boundary line both are on the land of B and they are unlawfully assailed by two persons endeavoring to kill them, and each, in an effort to save himself, controlled by the dominant motive existing in every man's mind of self-preservation, slays his adversary without retreating; say at the time neither A

nor B knew on which side of the line he was, could it be said, with any degree of respect for the principles of the reason, the logic and the justice of the law, that one was guilty and the other not? If neither retreated, and each was controlled by the same motive of self-preservation, could there be any arbitrary duty upon A to retreat, and on B no such duty be imposed? Would A be found guilty of murder and B discharged?

Again, supposing that A and B are assaulted feloniously by C and D on a tract of land, the title to which is yet undetermined, but claimed by both A and B. A and B believing their lives are in peril slay their assailants, without retreating and without stopping to consider in whom the title or ownership of the land is vested. In such case, according to the rule laid down by the Circuit Court of Appeals, the guilt of one and the innocence of the other should be determined by a civil action in ejectment, or trespass to try title, for its decision makes guilt or innocence depend entirely on the arbitrary question of title. This seems an absurd conclusion, yet it logically follows if the right to defend one's self against a murderous assault is made to depend on whether or not the party assaulted has title to the premises on which the assault occurred.

We submit that the rule announced by the early common law writers and recognized by this court in the Beard and Rowe cases, supra, is in accord with reason, and the principle announced at the civil law that "right need never yield to

wrong."

The Circuit Court of Appeals erred in not holding that the court below erred in not submitting the issue of assault with intent to murder to the jury.

PROPOSITION.

Where the evidence raises an issue as to whether or not the defendant was guilty of a lower grade of crime than manslaughter, the court should charge the jury thereon.

STATEMENT.

Defendant excepted to the charge of the court, before it was read to the jury, because it did not submit the offense of assault with intent to murder. See Tr. of Rec., p. 244, Par. Three of Exceptions.

The defendant also requested the court to submit as charge to the jury Special Requested Instruction No. 14, which is as follows, to-wit:

"Gentlemen of the Jury:

"In this case there is evidence that the shot that killed the deceased was the third shot fired by the defendant.

"If you believe from the evidence that such was the case, or if you have a reasonable doubt as to whether he was killed by the third shot, or by the fourth shot, and you should further believe that the fourth shot was fired with malice aforethought, express or implied, but you have a reasonable doubt as to whether the third shot was fired under such circumstances that if death had resulted therefrom it would have been murder, you are, in such event, instructed that you cannot find

the defendant guilty of any higher grade of offense than assault with intent to murder, for the results of such fourth shot." Tr. of Rec., p. 258. Bill of Exception No. 24.

EVIDENCE ON THE ISSUE OF ASSAULT WITH INTENT TO MURDER.

Brown testified that the third shot was the shot that killed the deceased, or at least that one of the first three shots killed the deceased. He further testified that the fourth shot was fired accidentally, and that before he fired the fourth shot Hermes was on the ground in a dying condition. See Tr. of Rec., pp. 195, 204.

Doctors Giles and Heaney, as experts, testified that the fatal shot was fired while the deceased was in an erect position Tr. of Rec., pp. 187-194.

Doctors Egbert and Lander, on behalf of the Government as experts, testified that the fourth shot was the fatal shot; therefore the issue was squarely made. Tr. of Rec., pp.....

There was evidence showing that the first three shots fired by the defendant were fired in his necessary self-defense, therefore the issue was squarely made. Tr. of Rec., pp. 131 and 214.

Three of the shots were superficial, and would not have caused the death of the deceased. Rec., pp. 131 and 214.

There was evidence that the third shot was the one which inflicted the fatal wound. See Testimony of Brown, Tr. pp. 195 and 204. Rec. pp. 195 and 204, and of Dr. Heaney, Tr. pp. 187 and 191, and of Dr. Giles, Tr. of Rec., pp. 191 and 194.

Under the theory of the Government, if the third shot caused the fatal wound, the defendant would not have been guilty of a higher offense than manslaughter, while if the fourth shot caused the death of deceased, defendant might be guilty of murder.

The question as to which shot caused the death of deceased became a material issue in the case.

Defendant requested a special charge No. 4, submitting his degree of culpability. See statement set out.

The whole theory of the Government's case, that the homicide was murder, depended upon whether or not the fourth shot was the one that inflicted the fatal wound. The issue was sharply made.

See testimony of Albert Wollschlaeger, Tr. of Rec. pp. 128-131.

See testimony of Robert B. Brown, Tr. of Rec., pp. 195-204 plaintiff in error's brief, pp. 148-159.

Dave Stockbridge, Tr. of Rec., pp. 173-175, plaintiff in error's brief, pp. 146-148.

J. A. Doughty, Tr. of Rec., pp. 148-152, plaintiff in error's brief, pp. 135-138.

Victor Gobea, Tr. of Rec., pp. 155-156, plaintiff in error's brief, pp. 139-140.

There was evidence that the fourth shot was not the fatal one. There was evidence, upon behalf of the defendant, that this shot was accidental. There was evidence that the first three shots were fired in self-defense. The court charged upon

the theory of accident, but there was also evidence upon the part of the Government that the fourth shot was fired deliberately and with malice aforethought, therefore defendant was entitled to have submitted to the jury fairly and squarely the issue of assault with intent to murder, and exception was preserved to the court's failure to charge thereon. This court seems of the opinion that since the Trial Court charged on the issue of accidental homicide, it was not compelled to charge upon the issue of assault with intent to murder. The issues were entirely distinct, and it was the right of the defendant to have this issue submitted to the jury, and the court erred in failing to do so.

As said in Bates on Federal Procedure at Law, Vol. 2, Sec 1093:

"It is absolutely essential to a common law jury trial, that all issues of fact be submitted to and decided by the jury; and it is the duty of the Trial Judge, who sits to preside over, direct and superintend the trial, to specifically submit all such issues to the decision of the jury. It is not sufficient that he refrain, merely, from assuming to himself the decision of such issues, but he must, by affirmative action, submit them to the jury, and require a decision of them, and it is error for the court to enter judgment so long as any material issue of fact remains undetermined. The duty of the judge is not fully met, and discharged by instructing the whole law of the case; it is an essential element of his duty that he submit all issues of fact to the tribunal established by law for

their determination, and to require their decision before a judgment can be lawfully entered."

The author, at Section 1094, says:

"It is the duty of the court to give in charge the law of the whole case, and if there be any evidence tending to support a controverted fact it should be submitted to the jury with appropriate instructions.

In Michie on Homicide, Sec. 307 (2), the author says:

"If there is any doubt whatever, it is the duty of the court clearly to define the several grades of homicide, leaving the jury to find from the evidence of what particular grade the defendant is guilty. The court should charge upon every issue raised by the testimony, including the different degrees of homicide as well as negligent homicide, where the testimony puts them in issue," citing—Stevenson vs. U. S. 162 U. S. 313; 40 L. Ed. 980, and a long line of state cases.

The defendant was entitled to have the question submitted, whether the homicide was a lower degree than charged upon his own unsupported evidence, and in——

State vs. Clark, 69 Kansas, 576, and State vs. Richardson, 194, Mo. 326, 92 S. W. 649, it is declared that whatever the grade of crime defendant's testimony tends to prove should be covered by appropriate instructions, and the culpability, thereof found by the jury.

It is respectfully submitted that the writ of certiorari should be granted as prayed for.

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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

ROBERT B. BROWN, PETITIONER,
v.
UNITED STATES OF AMERICA. } No. 1019.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION.

The points made in the petition as the bases of the application are as follows:

1. The indictment did not allege with sufficient particularity the locus of the offense so as to bring it within the exclusive jurisdiction of the United States.
2. The trial court did not charge the jury properly on the subject of self-defense as a justification or excuse for homicide.
3. The trial court did not submit to the jury the question whether defendant was guilty of any greater offense than assault with intent to kill.

These points are of a kind which constantly and ordinarily arises on the trial in the Federal courts of a case of homicide. Congress has made the judg-

ments of the Circuit Courts of Appeal final in criminal cases. Unless, therefore, the power granted to this Court to review such judgments by certiorari was intended to cover a power to review alleged errors as to matters of necessarily frequent and ordinary occurrence, it would seem that the present case falls outside of those calling for an exercise of the jurisdiction of this Court.

1. The indictment (Rec. 5–9) alleges that, prior to the offense, the United States had acquired certain lands at Beesville, Bee County, Texas, *specifically described by metes and bounds*, "for the public purpose of the said United States," and that on a certain date exclusive jurisdiction over said land had been ceded by Texas to the United States. The Constitution and Section 272, Criminal Code, par. 3, in referring to land over which the United States has exclusive power of legislation or exclusive jurisdiction, refer to it as land reserved or acquired "for the erection of a fort, magazine, arsenal, dockyard, or other needful building." The petitioner claims that the indictment should have specifically alleged that the land was acquired for the erection of a "needful building," and not confined itself to the allegation that it was acquired "for the public purpose of the United States." To this the answer is:

(*a*) "Needful" merely means "necessary for the public purposes of the United States." The erection of a building is not essential, these words being used merely to mark the type. Whatever land the United States can lawfully condemn under its power of

eminent domain, that it may assume exclusive jurisdiction over on cession by the State. Of the power in the United States to condemn land this Court said in *United States* v. *Gettysburg Electric Railway Company*, 160 U. S., 668, 679:

> It has authority to do so whenever it is necessary or appropriate to use the land in the execution of any of the powers granted to it by the Constitution.

The allegation in the indictment, therefore, that the land was acquired for a public purpose was sufficient.

(*b*) As pointed out by the Court of Appeals, the locus of the land is given in the most specific terms in the indictment. The Court is bound to take judicial notice that it is the site of the post office at Beesville (*Jones* v. *United States*, 137 U. S., 202, 212), and the specific description of it, taken with the allegation that it was within the exclusive jurisdiction of the United States, is sufficient (*Holt* v. *United States*, 218 U. S. 245, 247). (See also *Battle* v. *United States*, 209 U. S. 36.)

(*c*) As pointed out by the Court of Appeals, the indictment was sufficiently full and clear to advise the defendant of the charge he had to meet, so that no prejudice accrued to him from the omission complained of, and Section 1025, R. S., applies. (See also the Amendment of Section 269, Judicial Code, of February 26, 1919, 40 Stat. 1181.)

2. The charge of the Court on the subject of self-defense will be found in paragraphs 10, 11, and 13–B of the general charge. (Rec. 236, 238.) The charge

requested by the defendant but refused by the Court will be found on pages 252, 253 of the record. (See also Rec. 247.) The petition avers (pp. 4, 5) that the charge of the Court asserted an absolute duty upon the part of the defendant to retreat at all hazards when feloniously assaulted, and this is repeated in the brief (pp. 6, 7, et seq.). It is true that a statement to this effect is made in paragraph 10 (Rec. 236), but it is immediately qualified in paragraphs 11 and 13–B (Rec. 236, 238) by a clear assertion that where an assault is made with a dangerous weapon under such circumstances as to put a reasonable person in fear of his life or of great bodily harm and to make a retreat seem dangerous, the person assaulted may stand his ground and take the life of his assailant. This was the precise state of the record in *Addington* v. *United States*, 165 U. S. 184, 186–188, and this Court held that the subsequent qualification cured the defect. The same is true of the case at bar.

The general subject of self-defense has been carefully considered by this Court in the cases of *Beard*, 158 U. S. 550, *Alberty*, 162 U. S. 499, *Allen*, 164 U. S. 492 (see especially page 498), *Rowe*, 164 U. S. 546, and *Addington*, *supra*. The general charge of the Court in the case at bar conforms to the rule laid down in these cases. It must be read in the light of the alternative theories of the prosecution and defense. (See *United States* v. *Battle*, *supra*.) The former was that the deceased had no weapon and made no assault; the latter that the deceased

viciously attacked the defendant with an open knife. There were no peculiar circumstances of locus or personal status as in *Beard's* and *Alberty's* cases. As in *Rowe's Case*, the deceased and defendant were each entitled to be where they were. The charge fully covered the situation and, assuming defendant's theory, asserted his right to stand his ground and kill, not merely if his life was *in fact* in danger and retreat *in fact* impossible, but if a reasonable person would think his life imperilled and retreat dangerous to his personal safety. The apparent danger, not the real danger, was made the test. Further than this the law does not go in favor of intentional homicide.

3. If we understand the third point, it is this: Defendant fired four shots at Hermis, one of which killed him. There was a conflict in the evidence as to whether the fatal shot was the third or fourth. The defendant claimed it was the third, and that the fourth was fired accidentally; and he was, of course, entitled to have his claim presented to the jury by proper instructions. If, then, the defendant, after Hermis was dead, accidentally discharged a bullet which hit the corpse, the offense would be felonious assault under Section 276, Criminal Code. (The petitioner calls it "assault with intent to kill," but there seems to be no such Federal offense.)

This claim seems to be the same, in principle, as that made in *United States* v. *Battle*, 209 U. S. 36, 38, where the defendant excepted to the refusal of the

trial court to instruct the jury on the law of justifiable homicide, and this Court sustained the trial court because the evidence would not have warranted such a verdict.

So in the case at bar. That the defendant killed Hermis was not questioned. The only question was whether the killing was murder in one of its degrees, (depending in its turn on the degree of premeditation), manslaughter, (as being done in the heat of passion), or justifiable homicide, (being done in self-defense and constituting, therefore, no crime at all). The trial court charged fairly and fully upon these several offenses and their difference in the law. A verdict of guilty of felonious assault (or assault with intent to kill) would have been a travesty of justice from the point of view of the State and of the defendant as well.

The petition should be denied.

CLAUDE R. PORTER,
Assistant Attorney General.
W. C. HERRON,
Attorney.

June, 1919.

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